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1) Appeal Brief (14 pages)

Inventor(s): Andrew P. Meurer


S.N.: 09/812,376

Filed: March 20, 2001

Docket #: 8480

Comments:

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**RECEIVED
CENTRAL FAX CENTER****JUL 08 2005****IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

Application No. : 09/812,376
Applicant(s) : Andrew P. Meurer
Filed : March 20, 2001
Title : Specialized Merchandizing System
TC/A.U. : 3714
Examiner : Kurt Fernstrom
Conf. No. : 1283
Docket No. : 8480
Customer No. : 27752

APPEAL BRIEF

Mail Stop Appeal Brief - Patents

Commissioner for Patents

P. O. Box 1450

Alexandria, VA 22313-1450

Dear Sir,

This Brief is filed pursuant to the appeal from the U.S. Patent and Trademark Office decision of Paper No. 020405 mailed February 8, 2005. A timely Notice of Appeal was filed on May 9, 2005.

REAL PARTY IN INTEREST

The real party in interest is The Procter & Gamble Company of Cincinnati, Ohio.

RELATED APPEALS AND INTERFERENCES

There are no known related appeals, interferences, or judicial proceedings.

STATUS OF CLAIMS

Claims 1-20 are rejected. Claims 1-20 are appealed. A complete copy of the appealed claims is set forth in the Claims Appendix attached herein.

Appl. No. 09/812,376
Atty. Docket No. 8480
Appeal Brief dated July 8, 2005
Customer No. 27752

STATUS OF AMENDMENTS

No amendment was filed after the Final Office Action dated February 8, 2005.

SUMMARY OF CLAIMED SUBJECT MATTER

Independent Claim 1 pertains to a specialized merchandising system for use within a retail establishment to target a particular type of consumer. The specialized merchandising system provides a partitioned section within the retail establishment offering products and services meeting most, if not all, of the needs of the particular type of consumer and providing a pleasant shopping experience for the customer. The particular type consumer, also referred to as an intended consumer, may be characterized according to age, gender, race, or personal interest such as pets, sports, automotive, gardening and the like. Potential retail establishments harboring such a specialized merchandising system include grocery stores, department stores, supermarkets, superstores, and wholesale clubs. (Page 3, lines 11-19) The specialized merchandizing system includes a multipurpose customer interaction center (Figure 1, Item 20) within the partitioned section. The multipurpose customer interaction center 20 is an area within the merchandising system providing access to information and services accommodating the intended consumer. (Page 3, lines 20-24)

Independent Claim 11 pertains to specialized merchandising system for a retail establishment providing a variety of child care products for newborn infants, toddlers, and children under the age of five. The specialized merchandizing system includes a partitioned section within the retail establishment constructed with interior designs, colors, and graphics suitable for newborn infants, toddlers, and children under the age of five. (Page 5, lines 11-17) The partitioned section is arranged to offer a variety of products and/or services meeting the needs of this consumer and includes a multipurpose customer interaction center including informative marketing materials and/or educational materials pertaining to parenting and child care in general, as well as an activity center providing a place for children to play while their parents shop, relax or interact with other customers in a café or other area designed for customers to socialize. The multipurpose customer interaction center may additionally include computer terminals providing customers Internet access and making available an unlimited variety of products, services,

Appl. No. 09/812,376

Atty. Docket No. 8480

Appeal Brief dated July 8, 2005

Customer No. 27752

and information. In particular, the computer terminals in the multipurpose customer interaction center may provide customers easy access to websites offering current information pertaining to specific baby care products, baby stages of development, or childcare in general as well as sizing information and appropriate gift ideas relative to age groups. The computer terminals may also provide baby shower registry and planning ideas for celebrations such as birthdays, christenings, etc. The planning ideas may include items such as themes, clowns to hire, and party toy rentals. Further, the computer terminal may also enable customers to organize invitation list and provide a means for actually delivering the invitations to selected invitees via U.S. mail or Email. (Page 5, lines 18-34 through Page 6, lines 1-3). The partitioned section also includes a nutrition center, an equipment center, a hygiene center, and a clothing center directed to newborn infants, toddlers, and children under the age of five. (Page 6, lines 8-10) The nutrition center may display everything parents need for dinnertime including food accessories such as bottles, nipples, bottle liners, bibs, sippy cups, and dinnerware and food products ranging from baby food and formula to specialty dinners suitable for toddlers and children under the age of five. The equipment center may provide furnishings such as baby beds, high chairs, strollers, changing tables and the like. The hygiene center may include personal care products such as diapers, wet wipes, baby shampoos, baby washes, baby tubs, tub seats, bath toys, and so on. Further, the clothing center may offer apparel for girls and boys (Page 6, lines 10-19)

Independent Claim 17 pertains to a specialized merchandising system targeting women. For this embodiment, the partitioned section may be constructed with feminine interior designs and colors and include centers offering a variety of products and/or services that are particularly of interest to women. A multi-purpose customer interaction center provides computer terminals, an area where customers can socialize, public speaking accommodations for guest speakers (presenting topics on women's issues), and a library including informative marketing materials for products and educational materials pertaining to women's issues, and an activity area for children accommodating women shopping with children. (Page 7, lines 1-14) A nutrition center displays nutritional and dietary food products marketed mainly for women while an equipment center displays small hair care appliances such as dryers, curling irons, vanity mirrors, etc. In addition, a personal hygiene center for women displays personal care products such as tampons,

Appl. No. 09/812,376
Atty. Docket No. 8480
Appeal Brief dated July 8, 2005
Customer No. 27752

sanitary napkins, lotions, soaps, shampoos as well as makeup and perfumes. (Page 6, lines 29-34)

GROUND'S OF REJECTION TO BE REVIEWED ON APPEAL

- I. Claims 1-20 stand rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.
- II. Claims 1-15, and 17-20, stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Barnes & Noble in view of U.S. Patent No. 5,950,173 issued to Perkowski, referred to hereafter as "Perkowski".
- III. Claim 16 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Barnes & Noble in view of Perkowski and further in view of U.S. Patent No. 6,302,285 B1 issued to Fulle, referred to hereafter as "Fulle".

ARGUMENTS

- I. Claims 1-20, have been improperly rejected under § 112, second paragraph.
Claims 1-20 have been improperly rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. The Office asserts the claims are replete with numerous instances of claim language whose meaning is uncertain, in terms of how the structure of the invention is defined. Examples of such language include "interior designs reflecting characteristics" (claim 1), "fulfilling the needs of the particular type of consumer" (claim 1), "multipurpose customer interaction center" (claims 1, 11 and 17), "interior designs reflecting characteristics of a particular type of consumer" (claim 1), "area where customers can socialize" (claims 2, 13 and 18), "activity area for children" (claim 2), "public speaking accommodations" (claims 2 and 18), "educational materials" (claims 3, 5 and 19), "scheduling features" (claims 3 and 19), "informative marketing materials" (claims 4 and 18), "topics of interest" (claim 4), "highlight center" (claim 5), "seasonal and promotional products" (claim 5), "attuned with the particular type of consumer's diet" (claim 6), and "interior designs suitable for" (claim 11).

Appl. No. 09/812,376
Atty. Docket No. 8480
Appeal Brief dated July 8, 2005
Customer No. 27752

These rejections are respectfully traversed. An indefiniteness rejection requires the examiner to take into account the content of the particular application disclosure, the teachings of the prior art, and the claim interpretation that would be given by one possessing the ordinary level of skill in the pertinent art. MPEP 2173.02. In the instant case, the Office merely states a conclusion of indefiniteness without any analysis or support for this conclusion.

The central test under the definiteness requirement is that the claims set out with a reasonable degree of clarity and particularity the claimed subject matter. Further, the definiteness of a patent claim depends on whether one skilled in the art would understand the bounds of the claim when read in light of the specification. *Union Pac. Res. Co. v. Chesapeake Energy Corp.*, 236 F.3d 684, 692 (Fed. Cir. 2001), 57 U.S.P.Q.2D (BNA) 1293. In the instant case, there is no showing that one of skill in the art would not understand the claim terms at issue or the bounds thereof when interpreted in light of the specification.

- a) The claim terms identified by the Office as having uncertain meanings are adequately defined and explained in the specification

Each of the claim terms identified by the office as having uncertain meanings are adequately defined and explained in the specification as it would be interpreted by one possessing the ordinary level of skill in the pertinent art. For instance, Page 5, lines 10-15, of the specification describes an example of a particular type of consumer in that "one embodiment of the specialized merchandizing system may target newborn infants, toddlers and children under the age of five".

In addition, "the multipurpose consumer interaction center" is defined on page 3, lines 24-30, as

"an area within the merchandising system providing access to information and services accommodating the intended consumer."

Further, page 4, lines 13-19, suggest the location for the "multipurpose customer interaction center" and other centers forming the specialized merchandising system.

"The partitioned section can be divided into centers offering specific products and services for the intended consumer. For instance, the multipurpose customer interaction center 20, described above, may be located near the middle of the partitioned area surrounded by a nutrition center 40 displaying nutritional food

Appl. No. 09/812,376

Atty. Docket No. 8480

Appeal Brief dated July 8, 2005

Customer No. 27752

products, an equipment center 50 displaying furnishings, a personal hygiene center 60 displaying personal care products, a clothing center offering the latest fashions, and/or a highlight center 70 displaying seasonal and promotional products."

The other items identified by the office as having uncertain meanings such as "area where customers can socialize"; "activity area for children"; "public speaking accommodations"; "educational materials"; "scheduling features"; "informative marketing materials"; speak for themselves in that their ordinary meanings would be easily recognized by one of ordinary skill in the art. These terms are described in one embodiment on page 5 lines 16-24.

Terms such as "highlight center"; "seasonal and promotional products"; "attuned with the particular type of consumer's diet"; and "interior designs suitable for" - are also described in the specification as they would be interpreted by one possessing the ordinary level of skill in the pertinent art. For instance Page 6, lines 7-18 of the specification provides, "highlight center" displays promotional items, seasonal products and/or new products."

- b) Claim 10 provides antecedent basis for "the nutrition center", "the equipment center", and "the personal hygiene center".

The Office continues to assert that Claim 10 contains several examples of language which lacks antecedent basis, including "nutrition center", "equipment center" and "the personal hygiene center". The Office is referred to the Amendment and Response filed May 18, 2004 in response to office action mailed 2/25/2005 where claim 10 was amended to correct the lack of antecedent basis for the aforementioned terms.

Consequently, for the foregoing reasons, Attorney for the Applicant submits that claims 1-20 of the applicant's invention comply with the requirements of 35 U.S.C. 112, second paragraph. Therefore, the rejection should be withdrawn.

- II Claims 1-15 and 17-20, have been improperly rejected under § 103(a) over Barnes & Noble in view of Perkowski

To establish a prima facie case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or combine the reference teachings. See *In re Fritch*, 972 F.2d 1260 (Fed. Cir.

Appl. No. 09/812,376
Atty. Docket No. 8480
Appeal Brief dated July 8, 2005
Customer No. 27752

1992); MPEP § 2143.01. Second, there must be a reasonable expectation of success. In re Vaeck, 947 F.2d 488 (Fed. Cir. 1991); MPEP § 2143.02. Third, the prior art reference or combined references must teach or suggest all the claim limitations. In re Royka, 490 F.2d 981 (CCPA 1974); MPEP § 2143.03. Furthermore, in establishing a prima facie case of obviousness, case law clearly places the "burden of proof on the Patent Office which requires it to produce the factual basis for its rejection of an application under sections 102 and 103." In re Warner, 379 F.2d 1011, 1016 (CCPA 1967).

- a. The Office has failed to explain how Barnes & Noble qualifies as a partitioned section within a retail establishment.

Barnes & Noble is an independent bookstore which typically resides on its own as independent building or as leased space in a mall. Barnes & Noble is not a specialized merchandising system comprising a partitioned section within a retail establishment such as a grocery store, department store, supermarket, superstore, or wholesale club. The Office has provided no indication that current Barnes & Noble bookstores suggest or provide the motivation to set up one of their bookstores as partitioned section within a retail establishment such as a grocery store, department store, supermarket, superstore, or wholesale club.

- b. The Office has failed to provide any support for its assertions of motivation.

Case law provides that obviousness is a legal conclusion which is drawn "from facts appearing in the record or of which judicial notice may be taken." In re Warner, 379 F.2d 1011, 1015, 154 U.S.P.Q. 173 (CCPA 1967). Before a conclusion of obviousness can be made, facts must be evaluated to determine "(1) what was shown in the prior art at the time the invention was made, and (2) the knowledge which a person of ordinary skill in the art possessed at the time the invention was made." Id. Furthermore, a proper § 103 analysis requires, in part, consideration of, first, "whether the prior art would have suggested to those of ordinary skill in the art that they should make the claimed composition or device, or carry out the claimed process" and secondly, "whether the prior art would also have revealed that in so making or carrying out, those of ordinary skill would have a reasonable expectation of success." In re Vaeck, 947 F.2d 488, 493, 20 U.S.P.Q.2D 1438 (Fed. Cir. 1991). "Both the suggestion and the reasonable expectation of success must be founded in the prior art, not in the applicant's disclosure." Id.

Appl. No. 09/812,376
Atty. Docket No. 8480
Appeal Brief dated July 8, 2005
Customer No. 27752

The Office fails to provide documentary evidence to support its assertions of the motivation to combine Barnes & Noble with Perkowski. The Office admits that Barnes & Noble fails to disclose a customer interaction center and then states that such centers are known in retail establishments without further explanation. The Office then proceeds in explaining that Perkowski discloses in the Figures and in the specification one example of a multipurpose customer interaction center. However, Examiner does not indicate which figure or part of the specification of Perkowski providing such disclosure. Review of Perkowski reveals no such disclosure. In addition, Office has provided no explanation as to how Barnes & Noble bookstores provide the necessary motivation to combine Perkowski with such retail establishments. Perkowski is directed to a system and method for collecting consumer related information and transmitting and delivering the same along the consumer product supply and demand chain. Examiner has provided no explanation as to why one skilled in the art would be motivated to combine Barnes & Noble bookstores with Perkowski.

With regards to claims 2, 13 and 18, Office asserts that an area for socialization, an activity area and public speaking accommodations, are extremely broad and that any area is capable of being used by people for socializing, speaking or activity. However, Examiner provides no indication that Barnes and Noble provides such a customer interaction area and offers no explanation as to why one skilled in the art would be motivated to modify Barnes & Noble to provide such a customer interaction area.

With regards to Claims 3, 14 and 19, Office asserts that Perkowski discloses internet access but provides no explanation as to why one skilled in the art would be motivated to combine Perkowski with Barnes & Noble. Even if the necessary motivation were present, Perkowski does not disclose and therefore, the combination does not teach or suggest computer terminals providing internet access for online shopping, access to educational materials and scheduling features for planning activities.

With respect to claims 6-9, 11, 15, 17 and 20 Office asserts the particular type of consumer goods claimed are obvious variations on the known sections of Barnes and Noble without providing further explanation as to why they are obvious variations. Examiner states that in the case of claim 11, retail children's stores, such as Buy Buy Baby, contains different sections for different types of consumer goods. It is not clear what relation exists between Barnes and Noble and Buy Buy Baby or for that matter,

Appl. No. 09/812,376
Atty. Docket No. 8480
Appeal Brief dated July 8, 2005
Customer No. 27752

what relation Buy Buy Baby has to a specialized merchandizing system within a retail establishment.

III Claims 16 has been improperly rejected under § 103(a) over Barnes & Noble in view of Perkowski in further of view of Fulle

The Office rejected Claim 16 under 35 U.S.C. 103(a) as being unpatentable over Barnes & Noble in view of Perkowski, and further in view of Fulle. According to Office, Barnes & Noble in view of Perkowski discloses all of the limitations of the claim with the exception of merchandizing fixtures on casters. First, it is not clear how Barnes & Noble in combination with Perkowski disclose all of the elements claimed. Barnes & Noble is a bookstore and Perkowski is directed to a system and method for collecting consumer related information and transmitting and delivering the same along the consumer product supply and demand chain. The combination does not teach or suggest a specialized merchandising system for a retail establishment providing a variety of child care products for newborn infants, toddlers and children under the age of five and comprising a partitioned section within the retail establishment constructed with interior designs and colors suitable for newborn infants, toddlers or children under the age of five. Second, although Fulle may disclose a merchandising fixture having casters thereon, the Office has not provided any explanation as to why Barnes & Noble would be interested in such a fixture, and thus provide the necessary motivation to suggest combining Barnes & Noble bookstores with Fulle.

SUMMARY

The Federal Circuit has stated that “[i]f examination at the initial stage does not produce a prima facie case of unpatentability, then without more the applicant is entitled to grant of the patent.” In re Oetiker, 977 F.2d 1443, 1446, 24 U.S.P.Q.2D (BNA) 1443. In view of all of the above, it is respectfully submitted that claims 1-20, have not been properly rejected under 35 U.S.C. 112, second paragraph because the claims are not indefinite and under 35 U.S.C. § 103(a) because the Office has failed to establish a prima facie case of obviousness. Therefore, in light of the analysis and discussion provided above, Appellants respectfully request the Board of Patent Appeals and Interferences to

Appl. No. 09/812,376

Atty. Docket No. 8480

Appeal Brief dated July 8, 2005

Customer No. 27752

reverse the rejections of claims 1-20, to remand the application with instructions that these claims be allowed over the cited documents.

Respectfully submitted,

THE PROCTER & GAMBLE COMPANY



Signature

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Date: July 8, 2005

Customer No. 27752

Appl. No. 09/812,376

Atty. Docket No. 8480

Appeal Brief dated July 8, 2005

Customer No. 27752

CLAIMS APPENDIX

1. (Rejected) A specialized merchandising system for a retail establishment, the specialized merchandising system comprising a partitioned section within the retail establishment constructed with interior designs reflecting characteristics of a particular type of consumer and providing a variety of products fulfilling the needs of the particular type of consumer, the specialized merchandising system including a multipurpose customer interaction center within the partitioned section.
2. (Rejected) The specialized merchandising system according to claim 1 wherein the multipurpose customer interaction center comprises computer terminals, an area where customers can socialize, an activity area for children, and public speaking accommodations for guest speakers.
3. (Rejected) The specialized merchandising system according to claim 2 wherein the computer terminals provide internet access for online shopping, access to educational materials and scheduling features for planning activities.
4. (Rejected) The specialized merchandising system according to claim 2 wherein the multipurpose customer interaction center further comprises informative marketing materials regarding products available for the particular type of consumer and educational materials covering topics of interest to the particular type of consumer.
5. (Rejected) The specialized merchandising system according to claim 1 further comprising a highlight center within the partitioned section displaying seasonal and promotional products manufactured for the particular type of consumer.
6. (Rejected) The specialized merchandising system according to claim 1 further comprising a nutrition center within the partitioned section displaying food products attuned with the particular type of consumer's diet.
7. (Rejected) The specialized merchandising system according to claim 1 further comprising an equipment center within the partitioned section displaying furnishings designed for the particular type of consumer.
8. (Rejected) The specialized merchandising system according to claim 1 further comprising a personal hygiene center within the partitioned section displaying personal care products manufactured for the particular type of consumer.

Appl. No. 09/812,376

Atty. Docket No. 8480

Appeal Brief dated July 8, 2005

Customer No. 27752

9. (Rejected) The specialized merchandising system according to claim 1 further comprising a clothing center within the partitioned section displaying fashions designed for the particular type of consumer.
10. (Rejected) The specialized merchandising system according to claim 1 further comprising a nutrition center, an equipment center and a personal hygiene center wherein each center is within the partitioned section and wherein the partitioned section includes a common floor pattern throughout the partitioned section interrupted by separate, distinct floor patterns in the multipurpose customer interaction center, the nutrition center, the equipment center and the personal hygiene center in order to further accentuate each of the centers as separate and distinct areas of the specialized merchandising system.
11. (Rejected) A specialized merchandising system for a retail establishment, the specialized merchandising system providing a variety of child care products for newborn infants, toddlers and children under the age of five and comprising a partitioned section within the retail establishment constructed with interior designs and colors suitable for newborn infants, toddlers or children under the age of five, the partitioned section comprising:
- a multipurpose customer interaction center;
 - a nutrition center displaying food products and accessories suitable for newborn infants, toddlers or children under the age of five;
 - an equipment center displaying furnishings designed for newborn infants, toddlers or children under the age of five;
 - a hygiene center displaying personal care products manufactured for newborn infants, toddlers or children under the age of five; and
 - a clothing center displaying fashions designed for newborn infants, toddlers or children under the age of five.
12. (Rejected) The specialized merchandising system according to claim 11 wherein the partitioned section further comprises lavatory facilities including toilets and water fountains designed to accommodate children under the age of five.

Appl. No. 09/812,576

Atty. Docket No. 8480

Appeal Brief dated July 8, 2005

Customer No. 27752

13. (Rejected) The specialized merchandising system according to claim 11 wherein the multi-purpose customer interaction center comprises computer terminals, an area where customers can socialize, an activity area for children, public speaking accommodations for guest speakers, and a library including informative marketing materials for the child care products and educational materials pertaining to parenting and child care.
14. (Rejected) The specialized merchandising system according to claim 13 wherein the computers provide internet access for online shopping, access to educational materials pertaining to parenting, and organizing child related celebrations.
15. (Rejected) The specialized merchandising system according to claim 11 wherein the personal care products are disposable diapers, disposable wipes, baby care lotions, soaps, or shampoos.
16. (Rejected) The specialized merchandising system according to claim 11 further comprising merchandising fixtures on casters that can be rolled aside in order to expand the multi-purpose customer interaction center.
17. (Rejected) A specialized merchandising system for a retail establishment, the specialized merchandising system providing a variety of products for women and comprising a partitioned section within the retail establishment constructed with feminine interior designs and colors, the partitioned section comprising:
- a multipurpose customer interaction center;
 - a nutrition center displaying nutritional and dietary food products processed for women;
 - an equipment center displaying small hair care appliances designed for women;
 - and
 - a personal hygiene center displaying personal care products manufactured for women.
18. (Rejected) The specialized merchandising system according to claim 17 wherein the multi-purpose customer interaction center comprises computer terminals, an area where customers can socialize, public speaking accommodations for guest speakers,

Appl. No. 09/812,310

Atty. Docket No. 8480

Appeal Brief dated July 8, 2005

Customer No. 27752

and a library including informative marketing materials for products and educational materials pertaining to women's issues.

19. (Rejected) The specialized merchandising system according to claim 18 wherein the computer terminals provide internet access for online shopping, access to educational materials and scheduling features for planning activities for the particular type of consumer.

20. (Rejected) The specialized merchandising system according to claim 17 wherein the personal care products include tampons, sanitary napkins, lotions, shampoos, makeup or perfumes.